BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVANGELINA MEDINA	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	Docket No. 231,412
	)	
AND	)	
	)	
EMPLOYERS INS. CO. OF WAUSAU	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge Pamela J. Fuller's September 1, 2005 Review & Modification Decision. The Board heard oral argument on December 20, 2005.

APPEARANCES

C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier, Employers Insurance of Wausau (Wausau).

RECORD AND STIPULATIONS

The Board has considered the record set forth in the parties Stipulated Order filed December 30, 2005, together with the pleadings and exhibits in the administrative file. The stipulations are listed in the Review & Modification Decision and the Agreed Award.

ISSUES

This claim resulted from a series of work-related accidents and included injuries to claimant's arms, shoulders and back. A settlement was reached and an Agreed Award entered on January 7, 2000. Claimant alleged a series of accidents beginning "12/11/97 and each day worked thereafter"[1] but the Agreed Award was for two specific single dates of accident, December 11, 1997, for injuries to the bilateral shoulders and arms, and June 12, 1998, for a back injury. The Agreed Award also set out separate and different average weekly wages relating to these two accident dates, and it did not specify which average weekly wage was used to calculate the disability compensation.[2] Presumably, neither average weekly wage figure included fringe benefits as claimant was still working for respondent in an accommodated position at the time of the settlement.

This 9 percent permanent partial disability award is not separated or apportioned between the two accidents. It provides, however, that it "is based upon the medical opinions of Drs. C. Reiff Brown, J. Brent Koprivica, and Dirk H. Alander, copies of whose reports are attached."[3] Dr. Brown rated claimant's bilateral upper extremities at 7 percent to the body as a whole. He diagnosed chronic lumbar strain and gave permanent work restrictions for both the upper extremities and the back but found a 0 percent permanent impairment for the low back based upon DRE Lumbosacral Category I of the AMA *Guides.*[4]

Dr. Koprivica rated claimant's bilateral upper extremity injuries as a combined 12 percent whole person impairment with an additional 5 percent for the back. He likewise recommended work restrictions for both injuries. Dr. Alander's court-ordered independent medical examination report contains impairment ratings but does not include restrictions. Dr. Alander rated the upper extremities at 6 percent of the whole person and the low back at 3 percent, for a combined 9 percent whole person impairment.

In the Review & Modification Decision, the Administrative Law Judge (ALJ) found that claimant suffered subsequent accidents and injuries on September 4, 2000, and November 10, 2001, and received additional restrictions from her November 2001 injury. The ALJ determined that it was because of these new restrictions that respondent could

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[1]Form K-WC E-1 (filed Mar. 4, 1998).

[2]No temporary total disability compensation was paid. The Agreed Award provided for the payment of $11,610.25 based upon a 9 percent permanent partial disability. Using the higher of the two average weekly wages, $466.25, with a compensation rate of $310.85, 9 percent of 415 weeks equals 37.35 weeks times $310.85, which calculates to $11,610.25, the amount of compensation paid per the Agreed Award.

[3]Agreed Award (Jan. 7, 2000) at 2.

[4]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

not provide claimant with accommodated work. As a result, the ALJ found claimant was not entitled to a modification of her functional disability award to a work disability award.

At issue is the nature and extent of claimant's disability. Claimant contends the ALJ erred in denying her request for modification of her functional disability award to a work disability. Claimant argues that her job loss is due to a combination of the December 1997, June 1998 and November 2001 work injuries but primarily the accidents and resulting restrictions that are the subject of this docketed claim.

Respondent and Wausau request that the ALJ's decision be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was born in Mexico and has a third grade education. She began working for respondent in 1995, left for a time and then returned on January 13, 1997.

After her June 1998 injury, in order to accommodate her injuries and restrictions, claimant was moved to a light duty job in the glove room. On September 4, 2000, claimant injured her foot in a nonwork-related car accident and was off work until May 2001. When she returned, her light duty job in the glove room had been filled and she was given a job cleaning weasand rings, which was also a light duty job. She testified she was required to climb steps in order to do the job but that she was able to do this work with no problems.

On November 10, 2001, claimant fell at work while entering a restroom. When she fell, she injured her low back, left hip, left wrist and left shoulder. That accident is the subject of another claim, Docket No. 1,000,835. Claimant testified that the pain she has had since the November 2001 accident is different than that which she suffered from the 1997 and 1998 injuries. She testified she has a burning sensation that she did not have before. She also testified she now has problems sitting and standing for long periods, and it bothers her to climb steps or walk on an incline. Her neck pain causes her to have headaches. The pain in her hip goes all the way to her knee.

When claimant returned to work after the November 2001 injury, she returned to a job cleaning weasand rings until that job was eliminated by the respondent. She was then moved to another accommodated job in the mail room. Claimant was able to sit and stand as needed in the mail room, and she said that she was able to perform that work. However, respondent also eliminated the position in the mail room, and claimant was placed on a long-term leave of absence on November 18, 2002. Thereafter, claimant was required to return to respondent once a week to see if a job meeting her restrictions opened up. None did, and claimant was terminated in November 2003.

Susan Stephens is the workers compensation director for respondent. She testified that when respondent placed claimant in accommodated jobs after the June 1998 accident, respondent followed the work restrictions claimant received from Dr. Brown. For her injuries of December 1997 and June 1998, Dr. Brown recommended claimant permanently avoid using her hands above shoulder level and reaching away from the body more than 18 inches. He also restricted her from lifting from waist to chest level no more than 20 pounds occasionally and 10 pounds frequently. Accordingly, respondent moved claimant to the glove room to meet those restrictions. Ms. Stephens said claimant was able to work at this job within those restrictions until hurting her foot in a car accident in September 2000.

Claimant was treated by Dr. Villanueva for her foot injuries, and he released her to return to work with no restrictions. However, Ms. Stephens stated that when claimant returned, she was still complaining of pain in her foot, so respondent sent claimant to Dr. John McMaster. Dr. McMaster placed restrictions on claimant of no standing greater than two hours at a time with a one-hour break, no walking for greater than 15 minutes with a 15 minute rest period, no ladders and limited steps. When claimant returned to work in May 2001, she was given a light-duty job cleaning weasand rings. Ms. Stephens stated that respondent knew of Dr. McMaster's restrictions and "dealt with them."[5]

Ms. Stephens testified that when claimant returned to work after her November 10, 2001, injury, Dr. Terrence Pratt placed restrictions on her of avoiding frequent low-back bending or twisting, avoiding overhead activities with the left upper extremity, and no lifting in excess of 20 pounds other than overhead lifting, which was limited to 10 to 15 pounds. Ms. Stephens stated these were basically the same restrictions respondent had received from Dr. Brown after claimant's December 1997 and June 1998 injuries.

Ms. Stephens testified that claimant was placed on a leave of absence for one year beginning November 2002, but there were no openings at respondent between November 2002 and November 2003 that would accommodate her restrictions, particularly the restrictions of Dr. McMaster. Ms. Stephens testified that Dr. Murati's restriction requiring claimant to alternate sitting, standing and walking, which was received a few weeks after claimant was put on leave of absence, would be hard for respondent to accommodate. She stated that no jobs opened up that could have accommodated claimant within the restrictions of Drs. Brown, McMaster, Pratt or Murati.

Danny Briggs is a physician's assistant employed by respondent to evaluate and treat workers compensation injuries. He treated claimant in regard to her slip and fall on November 10, 2001. He testified that claimant never produced anything from a medical doctor indicating that any of her restrictions had been lifted. Claimant provided him with the new restrictions from Dr. Murati, which Mr. Briggs said were more restrictive, specifically the restriction of alternating sitting, standing and walking. He stated that this restriction would

[5]Stephens Depo. at 10.

be hard to accommodate at the plant. Mr. Briggs understood that this restriction was a result of the November 10, 2001, accident.

As for the restrictions claimant had been given for her work-related injuries before the November 2001 accident, those came from Dr. Brown and Dr. Koprivica. Dr. Brown saw claimant on August 3, 1998, to evaluate her injuries of December 11, 1997, and June 12, 1998. At that time, Dr. Brown was of the opinion that claimant should permanently avoid the use of her hands above shoulder level and avoid frequent reaching away from the body more than 18 inches. She should also avoid lifting more than 20 pounds frequently.

Dr. Brown saw claimant for a revaluation of her condition from her 1997 and 1998 injuries on February 15, 1999. At that time, he set out her restrictions as

> permanently avoid[ing] lifting above 20 or 30 pounds occasionally, 10 or 15 pounds frequently. She needs to do all lifting using proper body mechanics. She should avoid standing in a bent position for prolonged periods of time. Relative to the shoulders, she must avoid use of the hands above shoulder level and for reach away from the body more than 18 inches. She can lift 1 to 10 pounds between waist and chest levels frequently, 10 to 20 pounds occasionally. She should avoid frequent flexion/extension of the right wrist more than 20 degrees and frequent extension of the thumb more than 30 degrees.[6]

Dr. Koprivica first examined claimant on July 17, 1998, at which time he placed these restrictions on claimant:

> In my opinion, [claimant] should avoid activities which require repetitive above shoulder reaching or sustained activities above shoulder girdle level on a permanent basis. She should avoid repetitive pushing/pulling types of activities as well. In general, I would restrict her to light physical demand level of activities for below shoulder girdle activities as defined by "The Dictionary of Occupational Titles.[7]

Dr. Koprivica saw claimant again on May 25, 1999, for an evaluation. His report of that date states:

> In my opinion the restrictions which Dr. Brown has outlined on February 15, 1999, are appropriate based on the listed dates of injury.
>
> I would be in agreement that she should avoid physical demand activities of greater than light physical demand as defined by the "Dictionary of Occupational Titles," Fourth Edition, Revised 1991. She should avoid frequent or constant above shoulder reaching activities. I would recommend she avoid weighted activities above

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[6]Report of Dr. C. Reiff Brown, attached to Agreed Award (Jan. 7, 2000).

[7]Report of Dr. Brent Koprivica dated July 17, 1998, attached to Agreed Award (Jan. 7, 2000).

> shoulder girdle level even on an occasional basis. She should avoid sustained activities above shoulder girdle level.[8]

Frederick Smith, D.O., board certified by the American Board of Physical Medicine and Rehabilitation, American Osteopathic Board of Rehabilitation Medicine, American Board of Electrodiagnostic Medicine and American Board of Independent Medical Examiners, first saw claimant on September 13, 2002, at the request of respondent. Dr. Smith determined that claimant probably had bicipital tendonitis of the right shoulder, myofascial pain of the left cervicothoracic area and pain either coming from the left sacroiliac joint or myofascial pain in that area as well. He referred her to a pain management specialist in Wichita for injections. Dr. Smith saw claimant again on October 4, 2002. At that time he ordered a MRI of her lumbar spine. He last saw her on October 25, 2002, at which time he found her at maximum medical improvement. He opined that she had reached a status where she was prior to her fall of November 10, 2001, and there would be no new impairment nor any changes in her previous work restrictions. He released claimant from treatment with the recommendation that she continue with the restrictions she had before her injury on November 10, 2001. While he was treating her, his restrictions were that she only occasionally lift 15-pounds, no overhead reaching with her left upper extremity, standing and walking as tolerated, and using her left arm and hand with a 3-pound weight limit. He testified that Dr. Murati's restriction of alternate stand, sit and walk was similar to his restriction of standing and walking as tolerated. Dr. Smith's final report of October 25, 2002, states: "I do not believe there is any true new injury from her injury of November 2001. Any injury at that time certainly would have resolved by now, and it appears to have been just soft tissue."[9]

Dr. Pedro Murati examined claimant at the request of claimant's attorney on December 17, 2002. Although he was requested to evaluate claimant for her injury of November 10, 2001, he reviewed medical records of her injuries of December 11, 1997 and June 12, 1998, as well as her nonwork-related injury to her foot on September 4, 2000. He also reviewed reports from vocational rehabilitation experts, Michael Dreiling and Terry Cordray.

Using the AMA *Guides*, Dr. Murati rated claimant as having a 13 percent whole person impairment. He testified that this was the rating for the impairment claimant had at the time he examined her. He recommended claimant have the following restrictions: Frequent sitting, standing, walking, driving; occasional climbing stairs and squatting; rarely bending, crouching or stooping; no climbing ladders, crawling, above chest level or above shoulder level work on left. In addition, he recommended lifting, carrying, pushing or pulling above 20 pounds rarely, 20 pounds occasionally and 10 pounds frequently. He stated she

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[8]Dr. Brent Koprivica's report dated May 25, 1999, attached to Agreed Award (Jan. 7, 2000).

[9]Smith Depo., Ex. 5.

should not work more than 18 inches from the body on the left, should avoid awkward positions of the neck, and alternate sitting, standing and walking. Dr. Murati testified that these restrictions would be temporary, but if no medical treatment was received, they would be permanent. He testified that the only difference between his restrictions and claimant's earlier restrictions was that he did not want her to bend, crouch or stoop more than on a rare basis.

Claimant informed Dr. Murati of her previous preexisting injury to her right and left shoulders and right wrist and told him she had been compensated for those injuries; she denied preexisting injuries to her neck or low back. She told him that she had previously had pain in her left shoulder because of her repetitious job. Dr. Murati testified he did not take into consideration any preexisting impairment in his impairment rating. He attributed all of the impairment rating to the November 10, 2001, accident. Dr. Murati admitted he had records that indicated claimant had preexisting impairments but said he also had records that indicated claimant did not have preexisting impairment. He testified that claimant's restrictions are permanent and are likewise all due to her November 10, 2001 accident.

Dr. Murati reviewed the task lists prepared by Mr. Dreiling and Mr. Cordray and in both evaluations he opined that claimant has lost seven tasks out of nine for a 77.7 percent loss.

Dr. Terrence Pratt, who specializes in Physical Medicine and Rehabilitation, saw claimant on June 27, 2003, at the request of the ALJ, for an assessment of claimant's permanent partial impairment from the November 2001 accident. In his report, Dr. Pratt rated claimant with a 5% permanent partial impairment of the whole person for cervicothoracic involvement. For lumbosacral involvement, he gave her a 5% permanent partial impairment. Of that, 3% was for her prior injury and 2% for her November 10, 2001 injury. Claimant did not report any right shoulder involvement in the November 2001 injury, and Dr. Pratt gave her no rating for her left shoulder for that injury. Dr. Pratt gave her a total of 7 percent permanent partial impairment of the whole person in direct relationship to the accident of November 2001. Dr. Pratt clarified in his letter dated February 11, 2005 that his restrictions for claimant do not exceed claimant's restrictions before her November 10, 2001 injury. Dr. Pratt reviewed the task list provided by Terry Cordray and opined that claimant is capable of performing 6 of the 9 tasks listed for a 33.3 percent task loss. In reviewing Michael Dreiling's task loss list, he opined that claimant could perform 3 of the 7 tasks for a 43 percent task loss.

The Board finds that it is the combination of restrictions from claimant's work-related injuries that contributed to her no longer being employed with respondent and have caused her work disability. Accordingly, a permanent partial disability based on work disability

should be awarded in both docketed claims but with a K.S.A. 44-510a credit being given in Docket No. 1,000,835 for the weeks of work disability that overlap.[10]

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.[11]

Claimant testified at the February 17, 2005 Regular Hearing that she has been seeking employment ever since she was terminated by respondent. She submitted a long list of employers she contacted for a job. She has been unable to find work. Jon Rosell, Ph.D., a disability consultant and vocational expert, visited with claimant at the request of respondent for the purpose of trying to help her find employment. His first meeting with claimant was on March 17, 2005. Dr. Rosell regarded claimant's job at respondent to be unskilled labor, which he placed in the heavy category because of the significant amounts of weight she was required to lift before she was put on light duty. Dr. Rosell reviewed medical restrictions of Dr. Pratt and Dr. Murati, and he kept the restrictions of both in mind when going through job search activities with claimant. He noted that her work history has been unskilled and she does not have the benefit of any vocational education or training. Dr. Rosell testified that claimant stated a strong desire to return to work and appeared to be highly motivated to gain skills or abilities to assist her in returning to work. His rehabilitation plan included English language classes. Although he said claimant lacked many of the requisite skills and abilities to be able to find work within her restrictions, he also said he believed her chances of finding work would be improved if she increased her effort and number of contacts per week. He said claimant should make eight to ten contacts per week, with three to five of those being actual completed job applications. When asked whether claimant's three to five contacts per week for employment purposes was a good faith effort to find a job, Dr. Rosell stated:

> [C]ertainly if that is accurate, then I think that is demonstrating a degree of making contacts, obviously, and attempts to find employment. I think another variable that probably needs to be investigated are her abilities and skills to communicate and to

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[10] *See, e.g., Van Gordon v. IBP, Inc.*, Nos. 84,110 and 84,173 (unpublished Court of Appeals Opinion filed October 27, 2000); *Ewan v. Superior Industries*, Nos. 1,010,053 & 1,010,125 2006 WL _____ (Kan. WCAB Jan. 13, 2006); *Edwards v. Boeing Co.*, Nos. 258,706 & 1,006,143, 2005 WL 3030734 (Kan. WCAB Oct. 25, 2005); *Rivas v. IBP, Inc.*, No. 265,344, 2005 WL 1365140 (WCAB May 31, 2005); *Bailey v. Hallmark Cards, Inc.*, Nos. 248,868 & 248,869, 2004 WL 2093565 (WCAB Aug. 31, 2004).

[11] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

> interview effectively and to impart her best foot forward in those opportunities to seek employment.[12]

Dr. Rosell stated that Dr. Murati's restriction of alternating standing, sitting and walking would be a limiting factor and would make it more difficult to find work for claimant, but it would depend on the frequency of the need to alternate positions. He testified that it was his professional opinion that there would be full time work available for claimant, but he thought part-time employment might be a logical first step toward her gaining full-time employment.

Michael Dreiling testified he interviewed claimant by telephone on January 20, 2003, with the assistance of an interpreter. He stated that Dr. Murati's restrictions were more restrictive than those of claimant's other doctors. Mr. Dreiling prepared a task list of claimant's job tasks for the 15 years before her November 10, 2001 injury, which consisted of seven tasks. He testified that if claimant had made three to five applications or work contacts a week, that would be a reasonable effort at looking for jobs for an individual with her vocational profile. At the time he met with claimant, she was unemployed and therefore demonstrating a 100 percent wage loss. But if claimant were to get a job, Mr. Dreiling said she would be looking at minimum wage type work.

Terry Cordray is a vocational rehabilitation counselor in private practice. On January 5, 2004, he met with claimant at the request of respondent. He prepared a list of her tasks for the 15 years prior to November 10, 2001, which consisted of nine tasks. Mr. Cordray opined that with claimant's illiteracy, she would be limited to entry level or minimum wage jobs. When comparing her average weekly wage at the time of her accident with what she was making when he met with her, claimant had 100 percent wage loss. Mr. Cordray had no opinion whether claimant made a good faith effort to find employment because he did not know where she applied, how she filled out the applications, what she said during interviews or if she had any interviews, whether she had a résumé or whether she worked with any agencies that assist immigrants.

The Board finds that claimant has demonstrated a good faith effort to find appropriate employment. She is predominantly Spanish-speaking with a third grade education. She has few transferrable job skills within her restrictions and her potential job market is further limited by her geographic location. Although she could reasonably be expected to cooperate with job placement assistance, expand her job search to additional areas of employment, including part-time employment, and likewise expand the number of contacts she makes per week with prospective employers, her testimony, coupled with her list of contacts she has made, establishes a good faith effort. Accordingly, her actual 100 percent wage loss will be used in the work disability formula.

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[12]Rosell Depo. at 40.

The record contains opinions on task loss from two physicians, Dr. Pratt and Dr. Murati. Their opinions range from 33.3 percent to 77.7 percent, depending upon which vocational expert's task list is used and which restrictions are applied to the respective task lists. The Board finds both task lists to be credible and finds no persuasive reason to give greater weight to one task list over the other. Further, the Board finds both Dr. Pratt's and Dr. Murati's opinions have merit and should be given weight. Accordingly, giving approximately equal weight to the task loss opinions of Dr. Pratt and Dr. Murati, the Board finds claimant's task loss is 55.5 percent. When this task loss is averaged with the 100 wage loss, claimant's work disability is 77.75 percent.

The parties stipulated to and the Agreed Award was calculated based upon an average weekly wage of $466.25, exclusive of fringe benefits. When claimant lost her job, her fringe benefits ceased to be paid by respondent. The only evidence is that the value of those fringe benefits was $31.48 per week.[13] Accordingly, claimant's gross average weekly wage was $497.73, and her compensation rate is $331.84.

The Agreed Award should be modified effective either on the day after claimant's last work day for respondent, November 18, 2002, or six months before the date the application for review and modification was filed by claimant, whichever is later.[14] The Application for Review and Modification was filed January 30, 2004, so this review and modification is effective as of July 30, 2003.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review & Modification Decision of Administrative Law Judge Pamela J. Fuller dated September 1, 2005, is modified as follows:

The claimant is entitled to 37.35 weeks of permanent partial disability compensation at the rate of $310.85 per week or $11,610.25 for a 9 percent functional disability followed by permanent partial disability compensation at the rate of $331.84 per week for 147.43 weeks[15] or $48,923.17 for a 77.75 percent work disability.

As of January 27, 2006, there would be due and owing to the claimant 37.35 weeks of permanent partial disability compensation at the rate of $310.85 per week in the sum of

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[13]K.S.A. 44-511; K.A.R. 51-3-8(c).

[14]K.S.A. 44-528(d).

[15]Compensation in this claim would end 415 weeks after the June 12, 1998 date of accident, which is May 26, 2006. May 26, 2006, is 147.43 weeks after July 30, 2003, the date payment of the work disability begins.

$11,610.25 plus 130.43 weeks of permanent partial disability compensation at the rate of $331.84 per week in the sum of $43,281.89 for a total due and owing of $54,892.14, which is ordered paid in one lump sum less amounts previously paid. Thereafter, permanent partial disability compensation shall be paid at the rate of $331.84 per week for 17 weeks in the amount of $5,641.28 until May 26, 2006, the date which is 415 weeks after the June 12, 1998 date of accident, or until further order from the Director. This computes to a total award of $60,533.42.

IT IS SO ORDERED.

Dated this _____ day of January, 2006

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier Employers Insurance of Wausau
Terry J. Malone, Attorney for Respondent and its Insurance Carrier Liberty Mutual Insurance Co.
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director